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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

ELF-MAN, LLC,	)	Case No.: 2:13-CV-00395-TOR
Plaintiff,	)	
v.	)	PLAINTIFF'S MOTIONS IN
	)	RESPONSE TO DEFENDANT'S
RYAN LAMBERSON,	)	SECOND AMENDED ANSWER
Defendant.	)	AND AFFIRMATIVE DEFENSES
	)	TO PLAINTIFF'S FIRST
	)	AMENDED COMPLAINT; AND
	)	COUNTERCLAIM
	)	
	)	04/30/2014
	)	Without Oral Argument

Pursuant to Federal Rule of Civil Procedure 12, Plaintiff Elf-Man, LLC hereby submits the following motions in response to Defendant's Second Amended Answer and Affirmative Defenses to Plaintiff's First Amended Complaint; and Counterclaim (hereinafter "second amended answer") (ECF No. 36):

- Motion to Dismiss Counterclaims Pursuant to Fed. R. Civ. P. 12(b)(6) for Failure to State a Claim Upon Which Relief Can Be Granted;
- Motion to Dismiss Counterclaims and/or Strike Affirmative Defenses Based Upon Allegations of Fraud Pursuant to Fed. R. Civ. P. 9(b);

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– Motion to Strike Pursuant to Fed. R. Civ. P. 12(f) the following  
 redundant, immaterial, impertinent and/or scandalous matter in Defendant’s  
 second amended answer as listed:

1) all references to Plaintiff’s alleged “speculative invoicing program” and  
 related terms in that they are scandalous and intended for improper purposes,  
 including but not limited to the unfounded claim that Plaintiff is a “commercial  
 profiteer” (ECF No. 36 at ¶¶ 5, 38, 41,42, 54, 60);

2) affirmative defenses set forth in ¶¶ 2, 3, 5, 8, 10, 14, 23, 24, 25,26, 27, 28  
 (ECF No. 36 pp. 13-15);

3) the narrative set forth in the counterclaims section (ECF No. 36 pp. 16-  
 37, Counterclaim ¶¶ 1-56);

4) Prayer for Relief subsections d), f), g), h), and I) (ECF No. 36 pp. 37-  
 38); and

5) the exhibits to Defendant’s second amended answer.

Plaintiff supports these motions with the following points and authorities  
 and the record in this action.

#### MEMORANDUM OF POINTS AND AUTHORITIES

I Defendant’s Counterclaims Should Be Dismissed Pursuant to Fed. R. Civ.  
 P. 12(b)(6).

A. Dismissal of Defendant’s Counterclaims is Required on *Noerr-  
 Pennington* Grounds.

Under what has become known as the *Noerr-Pennington* doctrine,  
 participants in certain forms of petitioning of governmental entities are immune

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1 from civil liability based on such activities.<sup>1</sup> Although the doctrine originated in  
2 the context of immunity from liability under the federal antitrust laws, *Eastern*  
3 *Railroad Presidents Conference v Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961);  
4 *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), *Noerr-Pennington*  
5 immunity has been extended beyond the antitrust context. The doctrine's  
6 development is described at some length in the Ninth Circuit's decision in *Sosa v.*  
7 *DirecTV, Inc.*, 437 F.3d 923, 929-32 (9<sup>th</sup> Cir. 2006). In this discussion, the Court  
8 noted as follows:

9 "The Noerr-Pennington doctrine derives from the First Amendment's  
10 guarantee of 'the right of the people ... to petition the Government for  
11 a redress of grievances.' U.S. Const. amend. I. Under the *Noerr-*  
*Pennington* doctrine, those who petition any department of the  
government for redress are generally immune from statutory liability

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13 <sup>1</sup> Because it is intended to protect the petitioning of government for  
14 redress, the purposes underlying *Noerr-Pennington* are substantially the same as  
15 those underlying Washington's anti-SLAPP statute, RCW 4.24.525. This Court  
16 previously found that Defendant's state law counterclaims were "properly subject  
17 to a special motion to strike" under this statute. ECF No. 35 at p. 7. Because his  
18 remaining counterclaims are based upon Plaintiff's commencement of this and  
19 other legal actions and its investigations which gave rise to these actions,  
20 Defendant's remaining counterclaims are similarly subject to being dismissed on  
21 *Noerr-Pennington* grounds.

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1 for their petitioning conduct. *Empress LLC v. City & County of S.F.*,  
2 419 F.3d 1052, 1056 (9th Cir. 2005) (citing *Manistee Town Ctr. v.*  
3 *City of Glendale*, 227 F.3d 1090, 1092 (9th Cir. 2000)).

4 “The *Noerr-Pennington* doctrine arose in the antitrust context and  
5 initially reflected the Supreme Court's effort to reconcile the Sherman  
6 Act with the First Amendment Petition Clause. . . . Recognizing the  
7 constitutional foundation of the doctrine, the Supreme Court has  
8 applied *Noerr-Pennington* principles outside the antitrust field.”

9 437 F.3d at 929.

10 The *Sosa* decision is instructive because it dismisses an action on *Noerr-*  
11 *Pennington* grounds in circumstances substantially analogous to those at issue in  
12 the present controversy. *Sosa* concerned a civil action against DirecTV, Inc. for  
13 the mailing of tens of thousands of demand letters to persons who it believed had  
14 misappropriated its satellite television signal. *Id.* at 925-26. Plaintiffs had initially  
15 filed a civil action against DirecTV, Inc. in state court alleging violation of  
16 California's unfair business practices statute. *Id.* at 927. After this action was  
17 dismissed under California's anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16,  
18 the plaintiffs commenced a federal civil action against DirecTV, Inc. alleging that  
19 its conduct in relation to its demand letters violated the federal Racketeer  
20 Influenced and Corrupt Organizations Act. *Id.* The Ninth Circuit affirmed the  
21 dismissal of the plaintiffs' claim on *Noerr-Pennington* grounds, concluding that  
22 DirecTV, Inc.'s pre-litigation conduct (and not just its direct petitioning of  
23 government) was protected by the doctrine. *Id.* at 942.

24 Both of Defendant's counterclaims should be dismissed on *Noerr-*  
25 *Pennington* grounds. Although both counts are cast in terms of the federal

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1 Copyright Act, Defendant's second amended answer taken as a whole demonstrates  
2 that Defendant seeks to retaliate against Plaintiff for its lawful efforts to vindicate  
3 its rights under the Copyright Act by petitioning this Court for redress. Because  
4 the gravamen of both of Defendant's counterclaims stems directly from Plaintiff's  
5 initiation and litigation of this action, *Noerr-Pennington* requires dismissal of  
6 these claims. Moreover, under *Sosa*, to the extent that Defendant complains of  
7 some unspecified actions or statements made by Plaintiff, these are protected under  
8 *Noerr-Pennington* as well.

9 B Defendant's Counterclaims Do Not State Claims for Declaratory  
10 Relief.

11 Count 1 is simply the mirror image of Plaintiff's claim for copyright  
12 infringement. Defendant seeks no relief beyond the contours of the justiciable  
13 controversy alleged in Plaintiff's First Amended Complaint – Plaintiff has alleged  
14 that Defendant infringed its copyright and Defendant seeks a declaration that he  
15 has not done so. ECF No. 36 p. 36 at Counterclaim ¶ 58 (“Mr. Lamberson has not  
16 infringed any of plaintiff's exclusive rights in *Elf-Man* and seeks a formal  
17 declaration of the same. Defendant has been accused of three types of  
18 infringement, but he engaged in none.”). The Declaratory Judgment Act was  
19 intended to allow a party to challenge the constitutionality of a statute without  
20 having to violate it and has been extended to allow for a declaration of rights of  
21 adverse parties before they accrue avoidable damages. *See Steffel v. Thompson*,  
22 415 U.S. 452, 466 (1974) (discussing origins of Declaratory Judgment Act).  
23 Nothing in the Act or its implementing case law provides for the assertion of a  
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1 wholly redundant counterclaim.

2 Defendant's Count 2 seeks a declaration of copyright invalidity and  
3 unenforceability. ECF No. 36, p. 37 at Counterclaim ¶ 60 (claiming that Plaintiff  
4 "has engaged in unlawful speculative invoicing, improperly using its copyright as a  
5 weapon against innocent citizens such as defendant" and seeking a declaration that  
6 "the '286 registration is unenforceable and invalid and an order to plaintiff to  
7 cancel the '286 registration."). Because allegations of copyright misuse at most  
8 constitute affirmative defenses and do not constitute claims for relief, Count 2  
9 should be dismissed with prejudice. *See Interscope Records, Inc. v. Kimmel*, Case  
10 3:07-cv-00108-TJM-DEP at p. 9 (N.D.N.Y. June 18, 2007) (a copy of which is  
11 attached hereto as Attachment 1). The Court noted as follows: "Assuming that the  
12 affirmative defense of copyright misuse is cognizable in this Circuit, it is a defense  
13 and not 'a vehicle for affirmative relief.' *Broadcast Music, Inc. v. Hearts/ABC*  
14 *Viacom Entertainment Servs.*, 746 F. Supp. 320, 328 (S.D.N.Y. 1990); *see also*  
15 *Artista Records, Inc. v. Flea World, Inc.*, 356 F. Supp.2d 411, 428 (D. N.J. 2005)  
16 ('[C]opyright misuse is not a claim but a defense, and Defendants may not  
17 transmute it into an independent claim merely by labeling it one for declaratory  
18 judgment. '); [*Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 269 F. Supp.2d  
19 [1213,] 1226 [(C.D. Cal. 2003)]." *See also* 4 Melville V. Nimmer & David  
20 Nimmer, *Nimmer on Copyright* § 13.09[A][1][b] n. 1.1 (Matthew Bender rev. ed.)  
21 (quoting *Arista Records, Inc. v. Flea World, Inc.*, 356 F. Supp. 2d 411, 428 (D.N.J.  
22 2005)).

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1 Count 2 is an amalgam of Counts 2 and 3 of Defendant's first amended  
2 answer. In addition to seeking a declaration of copyright invalidity and  
3 unenforceability as in Count 2 of his first amended answer, it also seeks  
4 cancellation of Plaintiff's copyright as in Count 3 of that document. The  
5 combining of these counterclaims does not, however, remedy the defect previously  
6 identified by Plaintiff in connection with this counterclaim.

7 As Plaintiff noted in its previously filed motion to dismiss, ECF No. 20 at p.  
8 11-12, authority for cancellation of a U.S. copyright registration lies exclusively  
9 with the Register of Copyrights. 17 U.S.C. § 702. Various federal courts,  
10 including the Ninth Circuit, have concluded that the Register of Copyrights has  
11 primary jurisdiction over copyright cancellation requests and that such claims may  
12 not be adjudicated before the federal courts. *See, e.g., Syntek Semiconductor Co. v.*  
13 *Microchip Tech., Inc.*, 307 F.3d 775, 780-83 (9<sup>th</sup> Cir. 2002); *Tiseo Architects, Inc.*  
14 *v. SSOE, Inc.*, 431 F. Supp. 2d 735, 740 (E.D. Mi. 2006), and cases cited therein.  
15 Under this prudential doctrine, this Court should dismiss Defendant's Count 2 to  
16 the extent that he seeks cancellation of Plaintiff's copyright.

17 C Defendant's Counterclaims Do Not Meet the Pleading Standard  
18 Established in the *Twombly/Iqbal* Line of Decisions  
19

20 Like his earlier responsive pleadings, Defendant's second amended answer  
21 contains a lengthy narrative and voluminous exhibits. Despite its heft, however,  
22 Defendant's second amended answer fails to meet the pleading standard set forth in  
23 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), *Ashcroft v. Iqbal*, 556 U.S. 662  
24 (2009), and their progeny. These decisions require that Defendant provide "more

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1 than labels and conclusions, and a formulaic recitation of the elements of a cause of  
2 action.” *Twombly*, 550 U.S. at 555. They require further that Defendant set forth  
3 sufficient factual allegations to state a claim for relief that is “plausible on its face.”  
4 *Iqbal*, 556 U.S. at 677.

5 Count 1 (seeking a declaration of non-infringement) is simply the mirror  
6 image of Plaintiff’s claims. As such, the sole portions of Defendant’s narrative that  
7 relate to this counterclaim are those which deny liability on Plaintiff’s claims. ECF  
8 No. 36 pp. 17-19, Counterclaim ¶¶ 6 - 17. Of course, the denials in the answer  
9 portion of Defendant’s second amended answer render these allegations  
10 superfluous. The remainder of Defendant’s narrative and its exhibits have no  
11 relationship whatsoever to this counterclaim.

12 Presumably the bulk of Defendant’s narrative and its exhibits relate to Count  
13 2, which seeks a declaration of copyright invalidity and unenforceability.<sup>2</sup>  
14 Defendant’s hyperbole aside, the allegations in his narrative do not even come  
15 close to alleging sufficient facts to render this claim “plausible on its face.”

16 Defendant’s narrative consists of fifty-six paragraphs and thirteen exhibits.  
17 ECF No. 36 pp. 16-36. Paragraph 5 states the gravamen of Defendant’s position –  
18 it asserts that Plaintiff is engaged in some undefined “speculative invoicing  
19 program.” At no point in his lengthy narrative does Defendant allege any issuance  
20 of invoices by Plaintiff to Defendant or to any other party, nor does he allege what  
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22 <sup>2</sup> This issue is not free from doubt since Defendant fails to specify  
23  
24 which portions of his narrative and exhibits relate to his respective counterclaims.



1 Plaintiff has done that is “unlawful.” Indeed, rather than alleging any sort of  
 2 program, Defendant takes Plaintiff to task for the manner in which it has chosen to  
 3 protect its legal interest in its copyrighted work by pursuing claims of infringement  
 4 resulting from BitTorrent activity. Defendant cites to legal actions filed by  
 5 Plaintiff in various districts as if this is indicative of some unlawful or improper  
 6 conduct by Plaintiff and claims that it should have taken other measures to fight the  
 7 piracy of its film. ECF No. 36 pp. 26-29, Counterclaim ¶¶ 31-37. He fails to  
 8 explain, however, why these efforts to protect Plaintiff’s legitimate interests are  
 9 even suspect, let alone unlawful.

10 Defendant also alleges that Plaintiff “seeded” its own work to BitTorrent by  
 11 uploading the work itself. *Id.* pp. 29-33, Counterclaim ¶¶ 38-48.<sup>3</sup> He provides,  
 12 however, no factual basis for this claim. He argues that because some of the dates  
 13 of the infringement alleged in various actions precede *Elf-Man*’s various release  
 14 dates, that Plaintiff or its privies necessarily voluntarily made the film available to  
 15 a BitTorrent site. *Id.* p. 30 at Counterclaim ¶ 39. This allegation, standing alone,  
 16 does not even approach the *Twombly-Iqbal* standard. Given the complexity of  
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18 <sup>3</sup> Defendant also posits in passing that some third party seeded *Elf-Man*  
 19 to BitTorrent as a result of Plaintiff’s failure to exercise due care in protecting its  
 20 property. ECF No. 36 p. 33, Counterclaim ¶ 39, 47. At no point, however, does  
 21 Defendant explain how this purported lack of due care amounts to the intentional  
 22  
 23 misconduct that Defendant has alleged against Plaintiff.

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1 making, selling and distributing a feature film and the large number of persons  
2 involved in this process, Defendant's claim that Plaintiff or its privies must have  
3 seeded *Elf-Man* to BitTorrent at most presents a possible source, but hardly a  
4 plausible one. Indeed, it is far more plausible that a third party who had access to  
5 the work as a result of the sale, distribution, marketing or promotion of the film  
6 acted as the seeder to BitTorrent than to assume that Plaintiff undermined the value  
7 of its own copyrighted work and made it available for Internet piracy.

8       The remaining allegations in Defendant's narrative are simply irrelevant to  
9 either of Defendant's counterclaims. Paragraphs 18 - 25 and the related exhibits  
10 concern the setting up of Plaintiff and Wiseacre Films, LLC (the film production  
11 company operated by Plaintiff's principals) and the copyright registrations for *Elf-*  
12 *Man* and its screenplay. Paragraphs 27 - 29 appear to be designed to call into  
13 question whether Plaintiff is the proper party to pursue its claims in this action.  
14 Paragraph 27 and the related exhibit reference an action brought by Vision Films,  
15 Inc., Plaintiff's sales agent, in the Eastern District of Tennessee alleging  
16 infringement of *Elf-Man*. Paragraph 28 states that two of Plaintiff's principals,  
17 Ethan Wiley and Richard Jefferies, "may be necessary and indispensable parties."  
18 Paragraph 29 contains additional allegations regarding Vision Films, Inc. and also  
19 references Anchor Bay Entertainment, the film's distributor. Paragraphs 26 and 30  
20 concern the circumstances and the timing of the release of *Elf-Man*.

21       None of the foregoing provides an iota of support for Defendant's  
22 counterclaims. If Defendant in fact believes that Plaintiff lacks standing to bring  
23 this action, it could have filed a motion to dismiss on this ground. Similarly, if  
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1 Defendant in fact believes that there are necessary parties who have not been  
2 named in this action, it can file a motion to add any such party. None of these  
3 paragraphs, however, lend any support for Defendant's claim that Plaintiff is  
4 engaged in some sort of unlawful invoicing program.

5 Lastly, Defendant makes various allegations regarding alleged shortcomings  
6 in Plaintiff's investigation. ECF No. 36 pp. 33-36, Counterclaim ¶¶ 49-56. These  
7 allegations amount to nothing more than speculation and, like the remainder of  
8 Defendant's narrative, they are insufficient to meet the plausibility standard which  
9 applies to Defendant's counterclaims. Additionally, Defendant claims that  
10 Plaintiff's investigators were required to be licensed by the State of Washington  
11 and to post a bond under the State's regulatory scheme governing private  
12 investigators. *Id.* at Counterclaim ¶ 52. As Defendant is well aware, neither  
13 Plaintiff nor its investigators conduct business in the State of Washington and  
14 neither have any obligations whatsoever under the various regulatory statutes cited  
15 in Defendant's second amended answer. Plaintiff's connection to this jurisdiction  
16 stems solely from its out-of-state investigators having identified the infringement  
17 of its copyrighted work by persons located within this jurisdiction. Defendants  
18 also claim "upon information and belief" that Plaintiff is undercapitalized. *Id.* at  
19 Counterclaim ¶ 55. He fails to allege, however, a single fact in support of this  
20 claim.

21 II Defendant's Counterclaims and/or Affirmative Defenses Based Upon  
22 Allegations of Fraud Should Be Dismissed or Stricken Pursuant to Fed. R.  
23 Civ. P. 9(b).

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1 To the extent that Defendant's counterclaims and/or affirmative defenses are  
2 based upon his allegations that Plaintiff "seeded" its own film by making it  
3 available for BitTorrent downloading and/or that it is engaged in some undefined  
4 "unlawful speculative invoicing," they are subject to the heightened pleading  
5 standard set forth in Federal Rule Civil Procedure 9(b).<sup>4</sup> Rule 9(b) maintains a  
6 heightened pleading standard for claims sounding in fraud to "deter the filing of  
7 complaints 'as a pretext for the discovery of unknown wrongs' . . . [by]  
8 'prohibit[ing] plaintiffs from unilaterally imposing upon the court, the parties and  
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10 <sup>4</sup> Of Defendant's counterclaims, at the very least Count 2, which seeks  
11 a declaration of copyright invalidity and unenforceability due to some type of  
12 alleged lawful actions by Plaintiff, is based upon allegations of fraud. Because  
13 Defendant fails to specify which of the allegations made in the narrative set forth  
14 in his Counterclaims (and incorporated by reference into his Affirmative  
15 Defenses) relate to each of his affirmative defenses, Plaintiff can only surmise  
16 which of these affirmative defenses are based upon the allegations of fraud. At the  
17 very least, his affirmative defenses set forth in ¶¶ 12 (misuse of copyright), 15  
18 (actions of Plaintiff or privies); 18 (unclean hands), 19 (estoppel), 20 (waiver) and  
19 21 ("Plaintiff's copyright is invalid and unenforceable at equity."), appear to be so  
20 based (*id.* at pp. 14-15).

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1 society enormous social and economic costs absent some factual basis.” *In re Stac*  
2 *Elec. Sec. Litigation.*, 89 F.3d 1399, 1405 (9<sup>th</sup> Cir. 1996) (quoting *Semegen v.*  
3 *Weidner*, 780 F.2d 727, 731 (9<sup>th</sup> Cir. 1985)). To satisfy Rule 9(b), “the pleader  
4 ‘must state the time, place, and specific content of the false representations as well  
5 as the identities of the parties to the misrepresentations.” *Schreiber Distrib. Co. v.*  
6 *Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9<sup>th</sup> Cir. 1986).

7 Defendant’s counterclaims that sound in fraud must be dismissed for failure  
8 to comply with Rule 9(b). Similarly, any of his affirmative defenses which are  
9 based on allegations of fraud must be stricken for the same reason. Moreover,  
10 claiming the need for discovery to gain particularity violates one of the principal  
11 reasons for Rule 9(b) and should not be allowed. *U.S. ex rel. Elms v. Accenture*  
12 *LLP*, 341 Fed. Appx. 869, 873 (4<sup>th</sup> Cir. 2009).

13 III Fed. R. Civ. P. 12(f) Requires that Portions of Defendant’s Second Amended  
14 Answer Be Stricken.

15 Fed. R. Civ. P. 12(f) permits the Court to “strike from a pleading an  
16 insufficient defense or any redundant, immaterial, impertinent, or scandalous  
17 matter. Immaterial matter is “that which has no essential or important relationship  
18 to the claim for relief or the defenses being pleaded.” *Fantasy, Inc. v Fogerty*, 984  
19 F.2d 1524, 1527 (9<sup>th</sup> Cir. 1993), rev’d on other grounds, 510 U.S. 517 (1994).  
20

21 The lengthy narrative set forth in Defendant’s counterclaims, including  
22 numerous unnecessary and immaterial exhibits, is replete with material that should  
23 be stricken under Fed. R. Civ. P. 12(f). For the reasons outlined *supra* in  
24 addressing Plaintiff’s motion to dismiss for failure to state a claim, most if not all

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1 of the content is immaterial, much of it is redundant and little, if any, has any  
2 bearing on the counterclaims set forth after this narrative. If the Court grants  
3 Plaintiff's motion to dismiss these counterclaims, the accompanying narrative and  
4 exhibits should be stricken on materiality grounds. In the event that the Court  
5 denies Plaintiff's motions to dismiss these counterclaims, Defendant should either  
6 strike this narrative and its exhibits in their entirety or, in the alternative, order  
7 Defendant to re-plead these claims with a narrative which complies with Fed. R.  
8 Civ. P. 8(a)(2) (requiring "a short and plain statement of the claim showing that the  
9 pleader is entitled to relief") and 8(d)(1) (requiring that "[e]ach allegation must be  
10 simple, concise, and direct").

11 With respect to his affirmative defenses, the following should be stricken on  
12 the grounds stated:

13 -- Paragraph 23 (regarding third party beneficiary status) (ECF No. 36 p.  
14 15) amounts to nothing more than a denial and, as such, does not constitute an  
15 affirmative defense. This affirmative defense should also be stricken because it  
16 relates to Plaintiff's third claim for relief (indirect infringement), which the Court  
17 ordered dismissed in the related action brought by Plaintiff and from which this  
18 action was severed. ECF 106 in *Elf-Man, LLC. v. Brown et al.*, U.S. District Court,  
19 E.D. Wa. Case No. 13-CV-0115-TOR.

20 – Paragraphs 24 and 25 (relating to Plaintiff's investigators) should be  
21 stricken because Plaintiff's investigators do not fall within the statutory definition  
22 of private investigators for the purposes of the state law statutes relied upon by  
23 Defendant.  
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1 -- Paragraphs 26 and 27 (relating to admissibility of evidence and of witness  
2 testimony) do not constitute affirmative defenses. The issues raised in these  
3 paragraphs must be raised later in this proceeding at trial or in motions in limine.

4 -- Paragraph 28 (authorization to conduct business in Washington) (ECF No.  
5 36 at p. 16) is not a defense and is based upon the incorrect view that a party is  
6 required to be "authorized to conduct business in the State of Washington" in order  
7 to seek redress before this Court.

8 -- Paragraphs 2 (failure to add necessary parties), 3 (lack of standing), and 10  
9 (copyright registration certificate) should be stricken because they simply allege  
10 defects in Plaintiff's case and such allegations do not constitute affirmative  
11 defenses. *See Zivkovic v. Southern California Edison Co.*, 302 F.3d 1080, 1088  
12 (9th Cir. 2002) (citing *In re Rawson Food Service, Inc.*, 846 F.2d 1343, 1349 (11<sup>th</sup>  
13 Cir.1988)).

14 -- Paragraphs 5 and 14 (ECF No. 36 pp. 14-15) should also be stricken  
15 because while fair use may be a proper defense, allegations of that the downloaded  
16 material was not sufficiently perceptible or de minimis are not. "[A] taking may  
17 not be excused merely because it is insubstantial with respect to the infringing  
18 work. . . . '[N]o plagiarist can excuse the wrong by showing how much of his work  
19 he did not pirate.'" *Harper & Row, Publishers, Inc. v. Nation Enters., Inc.*, 471 U.S.  
20 539, 565, (quoting *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d  
21 Cir.1936)). There is no de minimis (or the like) defense to infringement.

22 -- Paragraph 8 (damages barred under 17 U.S.C. § 504(c)(1)) should be  
23 stricken because the Court has already ruled that Defendant's position with respect  
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1 to this issue is precluded by the prior severance of this action from the consolidated  
2 action referenced in this affirmative defense.

3 Even Defendant's prayer for relief contains immaterial matter which should  
4 be stricken. These include the following:

5 Subsection d) -- the requested order directing Plaintiff to cancel its copyright  
6 registration should not issue under the doctrine of primary jurisdiction;

7 Subsection f) -- this seeks a damages award, despite the fact that Defendant's  
8 sole claims for relief seek only declaratory relief and no monetary damages;

9 Subsection g) -- this raises issues which should be brought up, if at all, in  
10 motions in limine and not in the prayer for relief in Defendant's responsive  
11 pleading;

12 Subsection h) -- this seeks an order requiring Plaintiff to post a bond  
13 although nothing in the body of Defendant's responsive pleading supports this  
14 request -- the sole reference to a legal basis for requiring a bond is contained in  
15 Defendant's affirmative defense regarding the State of Washington's regulatory  
16 scheme for private investigators, to which Plaintiff and its investigators are not  
17 subject;

18 Subsection i) -- this seeks sanctions "for failure to provide discovery and to  
19 conduct a reasonable investigation." Of course, Defendant's responsive pleading is  
20 not the place in which discovery disputes should be raised. Rather, such issues  
21 must be raised in a motion pursuant to Fed. R. Civ. P. 37. Moreover, Defendant  
22 sought sanctions for alleged discovery violations by Plaintiff and the Court denied  
23

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25 PLAINTIFF'S MOTIONS IN RESPONSE TO  
26 DEFENDANT'S SECOND AMENDED ANSWER  
27 AND AFFIRMATIVE DEFENSES TO PLAINTIFF'S  
28 FIRST AMENDED COMPLAINT; AND  
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1 this request at a recent discovery conference. Subsection i) is wholly irrelevant to  
2 the issues raised in the body of Defendant's second amended answer.

3 Subsection i) also seeks sanctions for an alleged inadequate investigation.  
4 As Defendant is well aware, Fed. R. Civ. P. 11(c)(2) requires that such relief can  
5 only be sought by separate motion (and only when the issues raised in such a  
6 motion are ripe).

7 VI Conclusion

8 For the reasons set forth herein, Plaintiff respectfully submits that its motions  
9 to dismiss Defendant's counterclaims should be granted and that the dismissals  
10 should be with prejudice. Additionally, portions of the remainder of Defendant's  
11 second amended answer should be stricken as outlined above.

12 DATED: March 31, 2014

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